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NO. 82-165

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF WASHINGTON, ex rel.
SHANA MARIE GOODNER, a minor,
by her Guardian ad Litem,
REED HADLEY, and
DIANA LYNN GOODNER,

Respondents,

v.

CHARLES WILLARD SPEED,

Petitioner.

On Certiorari from the Supreme Court

of the State of Washington

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is an act of a territory reviewable by the supreme court of the successor state such that the state supreme court may declare the territorial enactment null and void and thus deny the right to a trial by jury in a civil cause of action?

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PETITION FOR CERTIORARI

OFFICIAL OPINIONS

The reported opinion in the instant case by the Washington State Court of

Appeals, Division II, can be found at 26 Wash. App. 648, 613 P.2d 1207 (1980).

The reported opinion by the Washington State Supreme Court in the instant case can be found at 96 Wash. 2d 838, ____ P.2d ____. (See Appendix A.)

GROUNDS OF JURISDICTION

The judgment which is sought to be reviewed is that of the Washington State Supreme Court which was filed on January 15, 1982. A timely Motion for Reconsideration was filed and the Order Denying the Motion for Reconsideration was dated April 28, 1982. The jurisdiction of this Court to review the decision of the Washington State Supreme Court is conferred by 28 U.S.C. §1257(3).

Because the constitutionality of the Territorial Act of 1881, an act of Congress, is drawn in question and 28 U.S.C. §2403(a) may be applicable, notice should be served on:

The Solicitor General
Department of Justice
Washington, D.C. 20530

Because the constitutionality of Washington State statutes, RCW 26.26.120(5), is in question and 28 U.S.C. §2403(b) may be applicable, notice should be served on:

Hon. Ken Eikenberry
Attorney General of the
State of Washington
Temple of Justice
Olympia, WA 98504
(206-284-5716)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

1. U. S. Const. art. III, §1:

§1. Judicial power; tenure of office

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. U. S. Const. art IV, §3:

§3. Admission of new states; power over territory and other property

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislature of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. U. S. Const. art. VI, §2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws

of any State to the Contrary notwithstanding.

4. Wn. St. Const. art. 1, §21:

§21. Trial by Jury. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

5. Wn. St. Const. art. 4, §4:

§4. Jurisdiction. The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, tool, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and other writs

> necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

(Emphasis added.)

6. Revised Code of Washington 26.26.130(5):

> The trial shall be by the court without a jury. [Added by Laws 2nd Ex Sess 1975-76 ch 42 §13.]

7. Revised Code of Washington 2.04.010:

> **2.04.010 Jurisdiction.** The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does

not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof.

8. An Act to Establish the Territorial Government of Washington (The Organic Act, Ch. 90, §6, 10 Stat., 172 (1853): (See Appendix B).

9. An Act to . . . enable the people of . . .Washington to form constitutions and state governments and to be admitted into the Union on an equal footing with the original states . . . .

(The Enabling Act, Ch. 180, §§4, 22, 23, 25 Stat., 676 (1889): (See Appendix C).

10. Washington Territorial Code of 1881, ch. LXVI, §1078, 1214-1221: (See Appendix D).

11. Wn. St. Const. art. 2, §19:

> **§19. Bill to Contain One Subject.** No bill shall embrace more than one subject, and that shall be expressed in the title.

STATEMENT OF THE CASE

The Petitioner, Charles Willard Speed, was accused by a Complaint in 1978 of being the father of Shana Marie Goodner. The Petitioner requested a jury trial, which request was denied on the basis that the Uniform Parentage Act passed by the Washington Legislature prohibits trial by jury [See RCW 26.26.120(5)]. The Petitioner alleged that he had a constitutionally protected right to a trial by jury because citizens of the Territory of Washington had been

guaranteed that right at the time of the adoption of the Washington State Constitution. The Supreme Court of the State of Washington held to the opposite. Thus, the instant question.

The question of whether or not the Washington State Supreme Court could hold a territorial act to be null and void was raised in the Washington State Court of Appeals, which passed on the issue as follows:

> As interpreted in State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958 (1897), the state's constitution protects the right of trial by jury as it existed in the territory at the time the constitution was adopted. Defendant urges that, in light of the right to jury trial provided in bastardy proceedings under the Territorial Code of 1881, ch. LXVI, § 1919, he should be provided a similar right despite RCW 26.26.120(5). That portion of the Territorial Code relating to illegitimate children, however, was held to have been improperly enacted in State v. Tieman, 32 Wash. 924, 73 P. 375 (1903). The effect of that determination was to revive

> the law as it stood prior to the enactment of the Territorial Code. Boeing Co. v. State, 74 Wn.2d 82, 442 P.2d 970 (1968). Accordingly, because no right to jury trial in filiation proceedings existed at the time the state constitution was enacted, defendant does not now have a meritorious constitutional challenge to RCW 26.26.120(5).

State v. Speed, 26 Wn. App. 648, 649, 613 P.2d 1207 (1980).

The Supreme Court of the State of Washington dealt extensively with the issue (see Appendix A) of the grant of authority to state supreme courts by Congress. (96 Wash. 2d 838, 844-846.)

The specific questions presented herein can be viewed from the following facts:

1. The Organic Act, which created the Washington Territory, was passed by Congress in 1853. (See Appendix B.)

2. The Washington Territorial Code of 1881, which was passed by the territorial legislature, enacted the

Bastardy Act and gave a right of trial by jury to an accused father. (See Appendix D.)

3. The Enabling Act, approved February 22, 1889, enabled the people of the Territory of Washington to form a constitution, to be admitted as a state, and provided in Sec. 24 that "[A]ll laws in force made by said Territories, at the time of their admission into the Union, shall be in force . . . ." (See Appendix C.)

4. The Washington State Constitution was adopted in October, 1889, and provided that the right to a trial by jury shall remain inviolate. (See Wn. St. Const. art. 1, §21.)

5. The Washington State Constitution protects a right to trial by jury as it existed in the territory at the time of the adoption of the state constitution. State, ex rel. Mullen v.

Doherty, 16 Wash. 382, 384, 42 P. 958 (1897).

6. Washington became a state by presidential proclamation on November 11, 1889. (26 Stat., Proclamations, p. 10, Nov. 11, 1889.)

7. In 1903 the Washington State Supreme Court declared the Bastardy Act to be invalid. (State v. Tieman, 32 Wash. 294, 73 P. 375 (1903).)

8. In 1976 the Washington State Legislature enacted the Uniform Parentage Act which denied the right to a jury trial to accused fathers. (RCW 26.26.150(2).)

9. The Washington State Supreme Court, in deciding the constitutionality of the Uniform Parentage Act, held that since Section 22 of the 1889 Enabling Act made the Washington State Supreme Court the successor of the supreme court of the territory, the Washington State Supreme

Court had the jurisdiction to declare territorial acts invalid. The supreme court reasoned that the nullity went to the incipience of the territorial act; and, thus, there was in fact no protected right to a jury trial in the territory at the time of the adoption of the Washington State Constitution. (See Appendix A.)

Thus, if the Supreme Court of the State of Washington did not receive the authority to declare a territorial act a nullity, the right to a jury trial in Bastardy or Uniform Parentage Act cases exists as a protected right to the citizens of the State of Washington and the legislative enactment denying that right is unconstitutional.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not

been, but should be, decided concerning the jurisdiction of successor state courts and their authority to declare acts of Congress void.

It is asserted in this petition that the Washington State Supreme Court in Tieman, supra, did not have the "jurisdiction" to invalidate an act of the federal government; i.e., the Territory of Washington. Further, it is urged that the Washington State Supreme Court has misconstrued the grant of Congress in the Enabling Act wherein it named "successor courts." This argument will proceed on three bases:

1. The grant of jurisdiction to the Supreme Court of Washington only permits review of the invalidity of Washington State statutes.

2. By federal law under the Supremacy Clause of the United States Constitution, Article VI, the state

supreme court is plainly without jurisdiction to invalidate a federal act.

3. The Washington State Supreme Court was not granted the authority to invalidate territorial acts by being named as the successor to the Washington Territorial Supreme Court.

A. Jurisdiction of State Supreme Court.

A court possesses only such jurisdictional powers as are conferred by the constitution or legislation of the sovereign under which it functions and Congress cannot vest the judicial power of the United States in state courts (20 Am. Jur. 2d Courts §91 (1965)). In Washington, the grant of jurisdiction to the supreme court is found in Article 4, Section 4, of the Washington State Constitution and in RCW 2.04.010.

Pursuant to both of those grants, the supreme court has jurisdiction over the validity of "statutes." Further, it is plainly the duty of the court to invalidate "statutes" if they contravene the state constitution (Windust v. Dept. of Labor & Ind., 52 Wash. 2d 33, 37, 323 P.2d 241 (1958).

There plainly is no grant of jurisdiction to render federal laws invalid. Thus, simply from this brief analysis, it can be seen that an attempt to invalidate an act which was not one of the sovereign, the state of Washington, is not within the jurisdiction of the state supreme court.

The authority and jurisdiction of the state supreme court could not antedate November, 1889, the date of statehood. It is not argued that the court in Tieman, supra, could not rule on "statutes" after that date, but it is

illogical to presume that the Washington State Supreme Court would have jurisdiction over acts which predated the existence of its own sovereign--the state. Thus, under the rationale of State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958 (1897), the right to a trial by jury existed in the territory at the time of the adoption of the constitution (October, 1889) and should still exist under the Uniform Parentage Act, RCW 26.

B. Supremacy and Territorial Clauses of U.S. Constitution.

In order to examine whether or not there was jurisdiction for the state supreme court to invalidate a territorial act, the U.S. Constitution should be examined. Two articles are important for this examination; i.e., Article VI, Clause 2--the Supremacy Clause, and

Article IV, Section 3, Clause 2--the Territorial Relations.

1. U. S. Constitution, Article IV, Section 3, Clause 2, states as follows:

> [2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State.

The court's attention is invited to U.S. v. Wheeler, 435 U.S. 313, 55 L.Ed. 2d 303, 98 S.Ct. 1079 (1978), wherein the supreme court briefly explained the identifying features of a "territory" and indicated that it is an agency of the federal government:

> Similarily, a territorial government is entirely the creation of Congress, "and its judicial tribunals exert all their powers by authority of the United States." Grafton v. United States, supra, 206 U.S., at 354, 27 S.Ct., at 755; see Cincinnati Soap Co. v. United

> States, 301 U.S. 308, 317, 57 S.Ct. 764, 768, 81 L.Ed. 1122; United States v. Kagama, 118 U.S. 375, 380 6 S.Ct. 1109, 111, 30 L.Ed. 228; American Ins. Co. v. Canter, 1. Pet. 511, 542, 7 L.Ed. 242. When a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as an independent political community like a State, but as "an agency of the federal government." Domenech v. National City Bank, 294 U.S. 199, 204-205, 55 S.Ct. 366, 369, 79 L.Ed. 857. (at page 1085.)

In early cases, the U. S. Supreme Court dealt with the entity of a territory and set forth the law concerning them:

> The government of the Territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government.

Snow v. U.S., 85 U.S. 317, 21 L.Ed. 784, 785 (1880).

2. U. S. Constitution, Article VI, Section 2, states as follows:

> [2] This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, and under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

It is plain that all laws of the United States shall be the supreme law of the land. 16 Am. Jur. 2d Constitutional Law §74 (1979). To see how these doctrines interplay, one need look no further than Testa v. Katt, 330 U.S. 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947), wherein a federal act had provided for penalty of treble damages; a state court held that a federal penal statute could not be maintained in state court. The supreme court made short shrift of that position, stating as follows:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. Mondou v. New York, N.H. & H.R. Co., supra, 223 U.S. at page 57, 32 S.Ct. at page 178, 56 L.Ed. 327, 38 L.R.A., N.S. 44.
>
> (at p. 814).

Thus, the sovereign for the Territory of Washington was the Congress of the United States, and only Congress, its legislative courts, or the United States Supreme Court under Article II, Section 1, Clause 1, could invalidate the act of the territory. The Supreme Court

of the State of Washington could not and cannot invalidate any act of Congress!

C. The Supreme Court has Misconstrued its Jurisdiction.

1. Purpose Violated.

The Washington State Supreme Court cited two cases--Byers v. Commonwealth, 42 Pa. 89, 94 (1862), and People v. One 1941 Chevrolet Coup, 37 Cal. 2d 283, 287, 231 P.2d 832 (1951)--for the proposition that in looking for the right (to see what is preserved for jury trials) we are to examine the issue historically. Historically, socially, factually, and legally in the territory, at the time of the adoption of the constitution--there was the right to a jury trial in bastardy proceedings. The Washington State Supreme Court was not asked to enlarge the right, merely preserve it. It destroyed the right by use of a legal fiction.

2. Enabling Act Rationale Incorrect.

a. The Washington State Supreme Court in Tieman, supra, did not have to delve back to the Organic Act and rely on the Enabling Act for its authority. The court in Tieman, supra, referred to a similar provision in the Washington State Constitution (p. 296). In fact, that provision is Article 2, Section 19:

> **§19. Bill to Contain One Subject.** No bill shall embrace more than one subject, and that shall be expressed in the title.

This was adopted in 1889 in the Washington State Constitution. Thus, a correct analysis would have been:

1) The Bastardy Statute was a state statute by virtue of Sec. 24 of the Enabling Act;

2) But it was unconstitutional by

virtue of Art. 2, Section 19 of the Washington State Constitution;

3) Thus, it was null and void as of the date of either adoption of the constitution or the date of statehood.

b. The grant of Congress through the Enabling Act was to give the territory a chance to form a state by adopting a constitution, which if it met certain guidelines, would be granted statehood. Note the guidelines in Section 4 (e.g., a republican form of government, no distinction in civil rights based on race or color, etc.).

The Washington State Supreme Court in the instant case held that by naming the state courts as successors, it granted the right to construe territorial acts--even to declaring them null and void. That rationale fails on examination:

1) Section 22 clearly

indicates that as to cases arising prior to admission:

> [T]he parties to such judgment shall have the right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the union.

2) Section 23 reserved the right to pending civil cases to request that litigants could choose their forums--either U.S. district courts or state courts.

Thus, Congress can confer concurrent jurisdiction on state courts for enforcement of penalties, but those courts have only such powers as Congress expressly grants. Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692, 162 A.L.R. 328 (1945). Here, Congress did not grant the right to declare void its own act. The grant of jurisdiction was limited, and presumed statehood, and presumed that all laws would be in effect

in the states as had been in effect in the territory, "except as modified or changed by this act or by the Constutitions of the States, respectively." (Sec. 24, Enabling Act.) Nothing granted the authority to declare territorial acts void.

c. The constitution of the State of Washington defined the limit of the judicial power of the supreme court, as set forth above, to decide the validity of statutes (not territorial acts); so, the constitution was self-limiting and the authority of the Supreme Court of Washington, which only came to being on November 11, 1889, could not antedate the inception of the state itself.

Thus, three premises are obvious:

1. The Supreme Court of the State of Washington, by constitutional grant and by statute, can only decide the

validity of state statutes. In this context, Tieman, supra, could have only declared null and void the Washington State statute relating to bastardy proceedings in effect after November 11, 1889.

2. Congress, who was the sovereign of the Territory of Washington, only set forth the diagram for the state and did not grant jurisdiction to declare its own acts void.

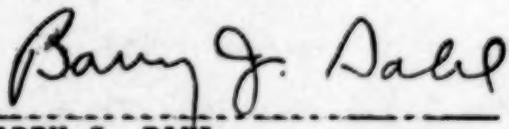
3. Historically, the right to a jury trial in bastardy proceedings was a fact; socially, it was a determination by the territorial legislature--an arm of Congress; and legally, it existed and could not be overturned by a state supreme court.

The usurpation of the authority by the Washington Supreme Court has lead to an enlargement of its authority; and it has denied the right to a jury trial to

its citizens when Congress had first guaranteed that right.

Therefore, Petitioner respectfully requests that this Court review the decision of the Washington State Supreme Court and decide the question presented by this case.

Respectfully submitted,



BARRY J. DAHL
Of Attorneys for Petitioner

APPENDIX A

[No. 47274-2. En Banc. January 15, 1982.]

THE STATE OF WASHINGTON, on the Relation of SHANA MARIE GOODNER, et al, Respondents, v. CHARLES WILLARD SPEED, Petitioner.

HICKS, J.--In a trial to the court, petitioner Speed was found to be the father of a child born out of wedlock and ordered to pay support and costs. He appealed to the Court of Appeals challenging the constitutionality of RCW 26.26.120, which defines a paternity suit as a civil action and states in subsection 5: "The trial shall be by the court without a jury." Petitioner's challenge is based on Const. art. 1, §21: "The right of trial by jury shall remain inviolate, . . ."

The Court of Appeals unanimously affirmed the trial court, rejecting petitioner's argument that in denying him a jury trial, RCW 26.26 violates the state's constitution. We affirm.

[1] The general rule as to state constitutional provisions protecting the right to jury trial is that they preserve the right in substance as it existed when the provision was adopted in the various states. 47 Am. Jur. 2d Jury §17 (1969); 50 C.J.S. Juries §10 (1947); State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 P. 958 (1897). Since this constitutional guaranty is similarly worded and viewed in nearly all the states, we quote the following discussion by Judge Strong, later of the United States Supreme Court:

It is insisted that this act is repugnant to that clause in the declaration of rights in the constitution which guarantees "that trial by jury shall be as heretofore, and the right thereof remain inviolate." The objection is based upon a misconception of what that right of trial by jury was which is protected by the constitution. The founders of this state brought with them to their new abode the usages to which they had been accustomed in the land from which they emigrated. Among them was trial by jury. That mode of trial had long been considered the right of every Englishman, and it had come to be regarded as a right too sacred to be surrendered or taken away. Even in England it was fundamental or constitutional, so far as any right can be where there is no written frame of government. Its extent and its privileges, how and when it was to be enjoyed, were perfectly understood, and in bringing it with them the founders of the Commonwealth doubtless intended to bring it as they had enjoyed it. None of the frames of government or constitutions under which we have lived have contemplated any extension of the right beyond the limits within which it had been enjoyed previous to the settlement of the state or the adoption of the constitution. No intention to enlarge it appears in the laws

> agreed upon in England in 1682. . . . [The constitutional provision] look[s] to preservation, not extension. It is the old right, whatever it was, the one previously enjoyed, that must remain inviolable, alike in its mode of enjoyment and in its extent. What, then, was this right thus cherished and thus perpetuated? We inquire not now after the mode in which such a trial was conducted. Our business at present is to ascertain how far the right to a trial by jury extended--to what controversies it was applicable. It was a right the title to which is founded upon usage, and its measure is therefore to be sought in the usages which prevailed at the time when it was asserted.

Byers v. Commonwealth, 42 Pa. 89, 94 (1862).

The historical nature of the test as to what "right" to jury trial must remain inviolate is well stated in People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 287, 231 P.2d 832 (1951):

> It is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution. It is necessary, therefore, to

> ascertain what was the rule of the English common law upon this subject in 1850.

Here, petitioner asserts that since this state's territorial legislature enacted a bastardy act elsewhere uniformly classified as a "civil" action, in the penal rather than civil code, thereby providing for a jury trial in filiation actions, he is constitutionally entitled to a jury trial in this case. Consequently, he contends RCW 26.26.120 should be struck down as unconstitutional. We disagree.

The territorial act, made a part of this state's statutory law at statehood by section 24 of the Enabling Act of February 22, 1889, ch. 180, 25 Stat. 676, was declared a nullity by this court in State v. Tieman, 32 Wash. 294, 73 P. 375 (1903). There, the act was challenged as invalidly enacted by the territorial legislature. the Tieman court determined that filiation proceedings were by all authority civil, giving rise to civil, not criminal liability. The court held that under the territory's Organic Act of March 2, 1853, ch. 90, 10 Stat. 172, the bastardy act was not properly enacted by the territorial legislature under the title: "'An act relative to crimes and punishments and proceedings in criminal cases.'" Tieman, at 295. The act was the second of a series of four intended to form the territory's general code, the others being a "'code of civil procedure,'" a "'probate practice act,'" and a "'justices' practice act.'" Tieman, at 295. In Tieman, this court, as the successor to the Territorial Supreme Court, concluded that the

bastardy act is "not, and never was, a valid enactment" (Tieman, at 298), since the territorial legislature violated the mandate of section 6 of the Organic Act, by enacting a civil law, not relating to "crimes and their punishment" (Tieman, at 296), under such a title.

The Organic Act above cited, was an act of Congress establishing the territorial government of Washington and empowering the territorial legislature to enact legislation in accordance with its provisions. Section 6 provides in part:

> SEC. 6. And be it further enacted, That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . .And all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

(Some italics ours.)

The requirement that "every law shall embrace but one object, and that shall be expressed in the title" was violated when the bastardy act pertaining to a civil proceeding was enacted under the title "An Act relative to crimes and punishments and proceedings in criminal cases." Consequently, State v. Tieman, supra, held the bastardy act to be null and void as improperly enacted under section 6 of the Organic Act.

[2] It is the rule in this state that an invalidly enacted statute is a nullity. It is as inoperative as if it had never been passed. State ex rel. Evans v. Brotherhood of Friends, 41 Wn.2d 133, 247 P.2d 787 (1952). The natural effect of this rule, as countenanced by the Tieman holding, is that once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment. Boeing Co. v. State, 74 Wn.2d 82, 442 P.2d 970 (1968); 82 C.J.S. Statutes §75, at 132 (1953); 16 Am. Jur. 2d Constitutional Law §177, at 402 (1964).

This court previously considered with approval Tieman and its holding when it determined that later legislation on the subject of filiation did not "revive" the prior bastardy act. Quoting from State v. Coffey, 77 Wn.2d 630, 636, 465 P.2d 665 (1970):

> Washington's original bastardy statute was enacted as part of the Code of 1881 (Code of 1881, §1212 to §1221). . . .In 1903, State v. Tieman, 32 Wash. 294, 73 P. 375 (1903), this court held the act unconstitutional. A

search of the compilation of laws of the state discloses that in 1905 the 1881 act was dropped from the code of laws with the notation that it had been held unconstitutional. Pierce's Code §1839 (1905). Thereafter, the act completely disappears from the compilations of statutes. Between 1903 and 1919, there were no filiation or bastardy statutes in the state. When the legislature enacted Laws of 1919, ch. 203, p. 709, now RCW 26.24, it created an entirely new and complete filiation act. No reference was made to the 1881 act and understandably so--it had been "out of the books" for 14 years. The legislature was neither amending nor reviving an existing act.

[3] Since there was no common law duty for a father to support his illegitimate children, there could be no common law "right" to a jury trial regarding his paternity of such children. 94 A.L.R.2d 1128 (1964). The vast majority of the courts deciding this issue have so held. See for example State ex rel. Mayer v. Pinkerton, 185 Kan. 68, 340 P.2d 393 (1959); Commonwealth ex rel. Miller v. Dillworth, 204 Pa. Super. 420, 205 A.2d 111 (1964); Smeido v. Jansons, 23 App. Div. 2d 796, 259 N.Y.S.2d 169 (1965); McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970); Comish v. Smith, 97 Idaho 89, 540 P.2d 274 (1975); State ex rel. Williams v. Herbert, 96 Kan. 490, 152 P. 667 (1915).

Nevertheless, petitioner argues, without apposite supporting authority, that this court lacked authority to invalidate the bastardy act of 1881. He invites us now to overrule Tieman, thus reinstating the bastardy act as a valid territorial statute and thereby furnishing the basis for striking down the current statute, RCW 26.26.120, as unconstitutional. This we decline to do.

[4] The grant of authority to this court to consider matters growing out of territorial legislation as in Tieman is contained in sections 22 and 23 of the Enabling Act. Those sections provide for the transfer of territorial cases pending at the time Washington became a state, to the state courts or the federal courts "as the nature of the case may require". Enabling Act, at §22. Section 22 also provides:

> And each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same, . . .

Since Congress intended that the state courts take over certain of the litigation pending in the territorial courts, it follows that as successor courts to the territorial courts the state courts would necessarily be required to construe territorial legislation in the course of deciding

such cases. The nature of the Tieman case indicated that it be brought before a state court, as was done, ultimately reaching the State Supreme Court.

The language of section 23 indicates that civil actions (as bastardy proceedings are correctly defined to be) shall be before state courts:

> [T]he courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts;. . .That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

The bastardy act of the territory was properly reviewable by the State Supreme Court as the successor to the Territorial Supreme Court.

[5] As to the determination that the territoral enactment was a nullity because it did not comply with the requirements of the territory's founding legislation, the Organic Act of 1853, section 6 of that act, as set forth above, in very precise language compels such a result. Other than by the enactment of the bastardy act under the territorial penal code, a putative father

would not have been entitled to a jury trial at the time of the adoption of our state constitution. Since that act was held a nullity in Tieman, the 1976 act of the legislature, reqiring that paternity suits be tried to the court, does not violate Const. art. 1, §21.

The New Mexico Supreme Court held to the same effect in State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957). Greenwood involved the right to jury trial based on territorial legislation subsequently found to be invalid by the State Supreme Court following statehood. The court held that later legislation eliminating the right to jury trial in certain contempt matters would not be deemed to violate the protective constitutional provision if the territorial legislation upon which the right was based was invalid.

In Greenwood, the New Mexico court determined that the territorial legislation was invalid as violative of the principle of separation of powers. Thus, even though the "right" to jury trial existed at the time the constitution of New Mexico was adopted, since it was based on an invalid enactment, later legislation eliminating the jury trial was upheld as constitutional.

The New Mexico court had not previously determined that the territorial legislation was a nullity, but did so in Greenwood, the case then before it. Here, the issue of the validity of the territorial legislation upon which petitioner bases his argued right to jury trial was long ago decided

adversely to him in State v. Tieman, 32 Wash. 294, 73 P. 375 (1903).

Finally, petitioner argues that this court recognized the constitutional right to trial by jury in filiation proceedings in State v. Kratzer, 70 Wn.2d 566, 424 P.2d 316 (1967). The Kratzer court held under the rule then prevailing that defendant had not waived his right to jury trial by failing to file timely a jury demand since the State faled to give timely notice of the trial date.

Kratzer was concerned with RCW 26.24, the filiation act, which was the predecessor to RCW 26.26, the Washington Uniform Parentage Act, at issue here. RCW 26.24 provided for jury trial in filiation proceedings. The issue before us, that is the power of the legislature to provide that trial of filiation matters be to the court without a jury, was not before the court in Kratzer. Thus the Kratzer court did not address the issue of whether a jury trial was constitutionally required in the face of legislation specifying that such actions be tried to the court. We now address that issue and hold a jury trial is not constitutionally required.

Affirmed.

BRACHTENBACH, C.J., and ROSELLINI, STAFFORD, UTTER, DOLLIVER, WILLIAMS, DORE, and DIMMICK, JJ., concur.

SEC. 6. And be it further enacted, That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect: Provided, That nothing in this act shall be construed to give power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the Territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of banknotes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the Legislative Assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said Territory; nor shall said Legislative Assembly authorize the issue of any obligation, scrip, or evidence of debt, by said Territory, in any mode or manner whatever, except certificates for service to said Territory. And all such laws, or

any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits

owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and

maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

SEC. 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of either of the Territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the State succeeding the Territory from which such record is or may be pending, or to the supreme court of such State, as the nature of the case may require: Provided, That the mandate of execution or of further proceedings shall, in cases arising in the Territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the State of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the State of North Dakota, or to the supreme court of the Territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and State courts herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within

the jurisdiction of such courts respectively with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

SEC. 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisidicton under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district courts of said Territory; and in respect to all other

cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any Territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or State court, as the case may be: Provided, however, That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of

the legislatures and Representatives in the fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this Act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitituions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

Sec. 1078. Issues of fact joined upon an indictment shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases.

OF ILLEGITIMATE CHILDREN.

Sec 1214. When any woman residing in any county of the territory is delivered of a bastard child, or is pregnant with a child, which, if born alive, will be a bastard, complaint may be made in writing by any person to the district court of the county where she resides, stating that fact, and charging the proper person with being the father thereof. The proceeding shall be entitled in the name of the territory against the accused as defendant.

Sec. 1215. Upon the filing of the complaint, the clerk shall cause notice to be given to the person so charged as in an ordinary action.

Sec. 1216. From the time of the filing of such complaint, a lien shall be created upon the real property of the accused in the county where the action is pending, for the payment of any money and the performance of any order adjudged by the proper court: Provided, That no lien shall attach, until notice of the pendency of the action is filed in the auditor's office of the county where the real property is situated.

Sec. 1217. If the complaint is verified, the district judge may order an attachment to issue thereon without bond, which order shall specify the amount of property to be seized under the attachment, and may be revoked at any time by such judge or the district court, on a showing made to either for a revocation of the same, and on such terms as such court or judge may deem proper in the premises.

Sec. 1218. The prosecuting attorney, on being notified of the facts, shall prosecute the matter in behalf of the complainant.

Sec. 1219. The issue on the trial shall be "guilty" or "not guilty," and shall be tried as an ordinary action.

Sec. 1220. If the accused be found guilty, he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the court shall direct, and with the costs of the suit; and the clerk may issue execution for any sum ordered, to be paid immediately, and afterwards, from time to time, as it shall be required to compel compliance with the order of the court.

Sec. 1221. The court may, at any time, enlarge, diminish or vacate any order or judgment rendered in the proceeding herein contemplated, on such notice to the defendant as the court or judge may prescribe.

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ALEXANDER L. STEVAS,
CLERK

NO. 82-165

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF WASHINGTON, ex rel.
SHANA MARIE GOODNER, a minor,
by her Guardian ad Litem,
REED HADLEY, and
DIANA LYNN GOODNER,

Respondents,

v.

CHARLES WILLARD SPEED,

Petitioner.

On Certiorari from the Supreme Court

of the State of Washington

BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

In February 1978 the Cowlitz County Prosecuting Attorney filed a complaint under the Uniform Parentage Act, Wash. Rev. Code 26.26, alleging that Petitioner was the father of Shana Marie Goodner, a child born out of wedlock to Diana Lynn Goodner on August 12, 1973.

Petitioner, who has been represented by counsel throughout this proceeding, denied paternity and the matter was set for trial. Petitioner's request for a jury trial was denied on the basis of Wash. Rev. Code 26.26.120(5): "The trial shall be by the court without a jury."

At trial, Petitioner admitted dating Ms. Goodner from November 1972 through January 1973, and admitted becoming engaged to Ms. Goodner, though the engagement lasted only a few weeks. Ms. Goodner testified that she and Petitioner had sexual intercourse regularly during the course of their relationship; Petitioner denied ever having had sexual intercourse with Ms. Goodner. Results of a blood test conducted by the Baltimore RH Typing Laboratory were admitted into evidence. The results showed that the plausibility of

Petitioner being Shana Marie Goodner's father was 99.47%, meaning that it is 187 times more likely that Petitioner is Shana Goodner's father than is a man selected at random.

The trial court found that Petitioner was Shana Goodner's father, and ordered him to pay child support of $62.50 per month through 1980 and $100 per month thereafter.

Petitioner appealed first to the Washington Court of Appeals and then to the Washington Supreme Court, claiming that the statutory provision denying jury trials abridged the state constitution. Both appellate courts unanimously rejected petitioner's claim. State ex rel. Goodner v. Speed, 26 Wash. App. 648, 613 P.2d 1207 (1980), aff'd, 96 Wash. 2d 838, 640 P.2d 13 (1982).

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction to grant certiorari. Petitioner's claim is that Wash. Rev. Code 26.26.120(5) violates the state constitution; his argument concerning the 1881 Washington territorial statute goes only to the historical question of the extent

of the right to trial by jury at the time of Washington's statehood in 1889. A territorial statute is not an "act of Congress" or a "law of the United States," and this case is not within the Court's jurisdiction under 28 U.S.C. §1257(3).

2. The Washington Supreme Court does have the power of judicial review over territorial statutes. The Enabling Act allowing Washington to enter the Union constitutes the state supreme court as a successor to the territorial supreme court. The territorial court had the power to review territorial statutes, and as its successor the state supreme court too has that power.

3. It is uncontested that the 1881 territorial statute was enacted in violation of the federal Organic Act creating the Territory of Washington. The supremacy clause thus required the state supreme court to uphold the federal statute and invalidate the territorial statute.

4. No "substantial and important reasons" exist for granting certiorari. Any federal issue in this case is remote at best. The result reached by the Washington Supreme Court is consistent with decisions of other

courts. And the question the Petition presents - the power of state courts to review territorial statutes - is largely of historical rather than current interest.

ARGUMENT

A. THIS COURT LACKS JURISDICTION TO GRANT CERTIORARI.

The Petition for Certiorari asserts, without elaboration, that the Court has jurisdiction in this case pursuant to 28 U.S.C. §1257(3). In pertinent part, that statute provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> . . . .

From the outset of this proceeding Petitioner's claim has been that the Washington statute requiring bench trials in paternity actions violates article 1, section 21 of the Washington state constitution, which provides that "[t]he right of trial by jury shall remain inviolate . . . ." In other words, Petitioner urges this Court to declare a state statute to be in violation of a state constitution. Respondents respectfully submit that this Court has no jurisdiction to grant certiorari in these circumstances.

1. **Petitioner's Claim Involves No Laws of the United States.**

Petitioner's argument is as follows: In 1881 the territorial legislature adopted a civil bastardy statute under which an alleged father had a right to a jury trial, 1881 Wash. Terr. Code §§1212-1221; that statute was still "on the books" at Washington's statehood in 1889; therefore the "right of trial by jury" which under the state's constitution must "remain inviolate" extends to actions under the Uniform Parentage Act.

Any tinge of federal color to this claim can come only from that 1881 territorial statute. And though

Petitioner variously suggests that the territorial act was an "act of Congress" and Congress' "own act," Petition for Certiorari at 2, 14, 22, 25, 27, in fact it was neither, as citation to just a few authorities will demonstrate.

In Miners' Bank of Dubuque v. Iowa, 53 U.S. (12 How.) 1, 13 L.Ed. 867 (1852), the Wisconsin territorial legislature had passed a statute granting a bank charter. Congress later created the Territory of Iowa out of a portion of the Wisconsin territory. The new Iowa territorial legislature then passed an act repealing the bank charter (the bank being located in Iowa). After the Iowa Supreme Court entered a judgment of ouster against the bank, the bank tried to appeal to this Court. As the basis for the Court's jurisdiction, the bank argued that its charter, granted by the territorial statute with the express approval of Congress, "should be regarded as an Act of Congress," such that the Iowa court's decision would have drawn in question a United States statute, thus allowing review by this Court under the predecessor to 28 U.S.C. §1257. The Court, however, rejected the bank's contention, declared that the bank's charter was merely

"the creature of that [Wisconsin territorial] Legislature," and dismissed the appeal for lack of jurisdiction. Id. at 8-9, 13 L. Ed. at 870.

See also Clayton v. Territory of Utah, 132 U.S. 632, 638, 10 S. Ct. 190, 33 L.Ed. 455, 458 (1890), where the Court, in holding that an Organic Act passed by Congress to establish a territory took precedence over an inconsistent act of that territory's legislature, stated as its beginning premise "that in case of a conflict between the Organic Act . . . and any act of the Territorial Legislature the Act of Congress must prevail." (Emphasis added.) Obviously the Court considered that it was dealing with only one "Act of Congress."

Finally, the Organic Act creating the Territory of Washington demonstrates the distinction between acts of the territorial legislature and acts of Congress. Section 6 of that Organic Act provides that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Act of March 2, 1853, 10 Stat. 172, ch. 90 §6 (emphasis

added). Plainly, territorial acts are not "acts of Congress" or "laws of the United States."[1]

2. This Case Does Not Come within 28 U.S.C. §1257(3).

Having shown that the bastardy statute enacted by the 1881 territorial legislature was not an act of Congress,[2] it can be readily seen that this case fits none of the categories of 28 U.S.C. §1257(3):

(a) Neither the Petition nor the decision of the court below "draw[s] in question" "the validity of a treaty or statute of the United States." What the Petition does draw in question is the validity of a state

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[1]Indeed, under 28 U.S.C. §1257 not even all statutes passed by Congress itself are considered to be laws of the United States. Key v. Doyle, 434 U.S. 59, 61, 98 S.Ct. 280, 281, 54 L.Ed.2d 238 (1977), holds that an act of Congress "applicable only in the District of Columbia is not a 'statute of the United States' for purposes of 28 U.S.C. §1257(1)."

[2]Petitioner's repeated characterization of the territorial bastardy act as an "act of Congress" and Congress' "own act" is so inexcusably inaccurate as to justify invoking Supreme Court Rule 21.5: "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition." (Emphasis added.)

statute; what the decision below drew in question was not the validity of a "statute of the United States," but an act of the territorial legislature.

(b) "[T]he validity of a State statute" is not "drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." Petitioner alleges that the state statute is "repugnant to" the territorial bastardy act and to the state constitution, neither of which is a "law of the United States."

(c) Finally, because Petitioner bases his claim wholly on non-federal grounds, no "right . . . is specially set up . . . under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

"Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms by which Congress has expressed its wishes.' " Palmore v. United States, 411 U.S. 389, 396, 93 S. Ct. 1670, 1675, 36 L.Ed.2d 342 (1973), quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212, 88 S. Ct. 1970, 1974, 20 L.Ed.2d 1037

(1968). No matter how Petitioner tries to dress up this case in federal clothing, it fits "with precision" none of the situations in which 28 U.S.C. §1257(3) allows the Court to grant certiorari. Petitioner's claim is fundamentally a claim that the Washington state statute violates the Washington state constitution. And Miller v. Cornwall Railroad Co., 168 U.S. 131, 134, 18 S. Ct. 34, 42 L.Ed. 409, 411 (1897), provides the answer to litigants seeking to have such claims heard by this Court: "We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state Constitution . . . ."

For the above reasons, Respondents respectfully assert that the Court lacks jurisdiction and that the Petition should be denied on that basis.

B. THIS CASE DOES NOT WARRANT THE COURT'S REVIEW BY CERTIORARI.

Setting aside the jurisdictional question, there is still nothing about this case to warrant the Court's discretionary review.

1. The Question Presented Was Correctly Decided by the Washington Courts.

Petitioner recognizes that the 1881 territorial bastardy act on which he bases his claim was held invalid by the Washington Supreme Court in 1903. State v. Tieman, 32 Wash. 294, 73 P. 375 (1903). The territorial legislature, in passing that statute, violated the following provision of the Organic Act:

> To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

Act of March 2, 1853, 10 Stat. 172, ch. 90 §6. Thus the Tieman court held that the territorial law "is not, and never was, a valid enactment." 32 Wash. at 298, 73 P. at 376. Petitioner has never contended that the territorial bastardy act was properly enacted. Rather, he contends that it is the Tieman decision that is the nullity, in that the Washington Supreme Court lacked the power to invalidate the territorial act. This argument has no merit, for the following reasons.

(a) The Washington Supreme Court is a successor to the Territorial Court. In 1889 Congress passed the

Enabling Act setting forth the terms upon which the Territory of Washington could be admitted into the Union. Act of February 22, 1889, 26 Stat. 676, ch. 180. It provided for the smooth transition from the territorial judicial system to the dual system of federal and state courts that would take effect with statehood. The Enabling Act created federal circuit and district courts, id. §21, provided for transferring cases from the territorial courts to the federal and state courts, id. §23, and declared that

> each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same . . . .

Id. §22.

Tieman, being a proceeding to determine paternity and fix a support obligation, was not cognizable in the federal courts, but could be commenced only in a state court. The appeal route too, of course, was to a state court - the Washington Supreme Court. To function as the state's highest court the Washington Supreme Court had to be able to review

the validity of the statute upon which the action against Tieman was based. As the court below said,

> [s]ince Congress intended that the state courts take over certain of the litigation pending in the territorial courts, it follows that as successor courts to the territorial courts the state courts would necessarily be required to construe territorial legislation in the course of deciding such cases.

State ex rel. Goodner v. Speed, 96 Wash. 2d 838, 844, 640 P.2d 13, 16 (1982).

Constituted by federal statute as the successor to the territorial supreme court, the Washington Supreme Court did have the authority to hear, and sustain, Tieman's challenge to the validity of the territorial bastardy statute.

(b) The supremacy clause requires the result reached in Tieman. The Tieman court had before it two statutes - the Organic Act passed by Congress in 1853 and the bastardy statute enacted by the territorial legislature. Petitioner concedes that the manner in which the latter was enacted violated the Organic Act.

The supremacy clause, U.S. Const. art. VI, compelled the result reached in Tieman. Even accepting Petitioner's claim that the territorial act was

somehow federal in character, that act clearly was of lesser rank than the Organic Act. And the premise stated by this Court in Clayton v. Territory of Utah, 132 U.S. 632, 638, 10 S. Ct. 190, 33 L.Ed. 455, 458 (1890), discussed above, leaves no doubt as to the result the Tieman court had to reach: "in case of a conflict between the Organic Act creating the Territory . . . and any Act of the Territorial Legislature, the Act of Congress must prevail."[3]

It is curious that Petitioner cites the supremacy clause as a bar to the state court's decision to abide by the Organic Act as against the territorial statute. His argument - that because of the "federal" character of the territorial act the supremacy clause immunized it from challenge in a state court - produces absurd results. If territorial laws are beyond the pale of state judicial power, they are equally outside state legislative power, for the state legislature has no authority to

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[3]See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78, 2 L.Ed. 60, 73-74 (1803) ("If two laws conflict with each other, the courts must decide on the operation of each . . . . This is of the very essence of judicial duty.").

overturn an "act of Congress." Petitioner's theory thus means that the territorial statutes Washington inherited at statehood in 1889 must still be in effect today, that the Washington legislature has no power to amend or repeal them, and that only by federal legislation may those nineteenth century laws be altered.

Far from prohibiting the result reached in Tieman, the supremacy clause compelled it.[4]

2. The Case Presents No "Substantial and Important Reasons" Justifying Discretionary Review.

Under Supreme Court Rule 17.1 writs of certiorari are limited to cases presenting "substantial and important reasons" for review. This case presents no such reasons.

First, even if the question of the Tieman court's power to invalidate the territorial act is deemed a

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[4]The duty imposed on state courts by the supremacy clause requires them to disregard even United States statutes, when those statutes contravene the U. S. Constitution. This is implicit in 28 U.S.C. §1257(1), which grants a right to appeal to this Court from a state court's decision "where is drawn in question the validity of a . . . statute of the United States and the decision is against its validity." (Emphasis added.) Cf. Flournoy v. Wiener, 321 U.S. 253, 64 S. Ct. 548, 88 L. Ed. 708 (1944).

federal question, resolution of that issue is of secondary rather than primary importance to whether Petitioner is entitled to a jury trial. For a decision on the merits by this Court will only serve to clarify an issue of state law - whether the "right of trial by jury" protected by the Washington state constitution extends to paternity actions. The remoteness of any federal issue counsels against an exercise of this Court's discretionary authority.

Second, viewing the case on a national scale, the issue it presents has not divided the nation's courts, nor does it have any enduring significance.

As the court below noted, Petitioner's argument that a state court lacks the power of judicial review over territorial statutes is made "without apposite supporting authority." 96 Wash. 2d at 844, 640 P.2d at 16. Indeed, other state courts have dealt with the issue the same way the Washington Supreme Court did in both Tieman and this case. In State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957), the New Mexico Supreme Court declared invalid a territorial statute that contravened the separation of powers. And

in Bailey v. Fairbanks Independent School District, 370 P.2d 526 (Ak. 1962), the Alaska Supreme Court reviewed a territorial act against a claim that it violated the federal Constitution. The court sustained the act, but that it entertained the challenge at all demonstrates its power to review territorial statutes.

The absence of any enduring significance in the question the Petition presents is readily apparent. Territorial statutes have little relationship to the body of law applicable in today's society. The authority of state courts to review territorial statutes is an issue that may have had some importance at time in our history when territories were being regularly admitted into the Union. This last occurred 22 years ago, however, and in this century only five territories have become states. Indeed, Petitioner's argument goes not so much to the Washington Supreme Court's decision in this case as to its 1903 decision in Tieman.

At best, the Petition raises an issue of historical or academic interest; such issues are inappropriate for review by certiorari. Rice v. Sioux City Memorial Park

Cemetery, Inc., 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897, 901 (1955).

CONCLUSION

Respondents respectfully request that the Petition for Certiorari be denied.

DATED this 17th day of August, 1982.

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